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Supreme Court of the United States

OCTOBER TERM, 1964

No. 468

IN THE MATTER OF THE PETITION OF
THE CITY OF NEW YORK,
Petitioner,

As owner of the Ferryboat TOMPKINSVILLE for a limitation of or exoneration from liability,

ROSE BERNSTEIN, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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The respondents submit this brief in opposition to the petition for a writ of certiorari.

The petitioner presents the question as to whether an Admiralty Court has discretionary power to allow prejudgment interest on a personal injury claim. The Court of Appeals remanded the case to the District Court to determine the amount of the prejudgment interest, consistent with the following material part of the Court's opinion (Resp. Ap. A. 12, 13):

> "In this case 17 claimants suffered physical injury. Elements of these claims included the cost of medical care, X-rays, medication, and pain and suffering as well as the pecuniary loss attributable to absence from employment. We see little reason for distingush-

ing between the loss resulting from medical expenses, pain and suffering, and diminution of earning power in the action involving a wrongful death and the case where, as here, the plaintiffs' injuries though not fatal nonetheless warrant the awarding of damages. In both the *Moore-McCormack* v. *Richardson* (295 F. 2d 583, cert. denied 368 U. S. 989) case and in the instant case the plaintiffs suffered a loss at a time long prior to the determination of the dollar measure of the loss. The defendant's liability arises at the time of the injury to the plaintiff and the later award by the court merely fixes the amount of a loss suffered at a prior time.

The broad application of *restitutio in integrum* enables a more equitable measure of the loss to the injured party—particularly in light of the progressively long delays in disposing of much of the litigation which must wait its turn on crowded court calendars. Moreover, the award of prejudgment interest discourages sham contentions and an improper use of the law's delays and thereby assists an earlier settlement between the parties.

Certainly the granting of prejudgment interest is not appropriate when the determination of damages itself includes some compensation for the delay from the time of injury to the time of judgment. All the claimants presented evidence before the Commissioner who determined the damages to each. These awards varied between $150 and $18,000. Yet nowhere in the report of the Commissioner is there any indication whether the damages allowed reflect the delay in assessing damages. In addition the report of the Commissioner does not reveal whether any of the damages allowed here represent compensation for future loss of earnings or future pain and suffering. To the extent that there are elements of future losses which are represented in the final damages prejudgment in-

terest is, of course, not appropriate. We therefore remand the case to the district court to determine consistent with this opinion what is the proper portion of the damages awarded for each claim on which the prejudgment interest should run."

As to the Question Presented

This rule as to prejudgment interest in Admiralty cases has been consistently followed in *The Scotland*, 118 U. S. 507; *The Baltimore*, 75 U. S. 377; *The Manhattan*, 85 F. 2d 427 (3 Cir. 1936), cert. denied, *sub nom. United States* v. *Bessemer*; 300 U. S. 654 (1936); *Moore-McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583, cert. denied 368 U. S. 989 (1962).

In the instant case, the Court of Appeals said in reference to the *Moore-McCormack* case, *supra* (Pet. Ap. A. 11):

> "'when a court fixes damages to compensate for a loss which occurred in the past, there should be some allowance for the period between the date of the loss and the date of judgment. Recompense may thus be given for the further loss in the postponement of the receipt of compensation. In all too many instances the delay in reaching cases for trial brings suffering and privation to those who were dependent on the deceased. Even the more fortunate of the bereaved may have been forced to borrow money at interest to meet their expenses . . . [T]he defendants who are ultimately directed to pay have had the use of the money declared to be due . . .' *Supra* at 594. It is the combination of these two elements, the immediate loss to the plaintiff and the delay in the payment of compensation by the defendant that warrants the granting of prejudgment interest as a proper element of damages in fixing

the loss to the dependents of decedent who bring suit in a court of admiralty."

"The petitioner has strenuously litigated each and every facet of this case" over a period of five years (Resp. Ap.—Palmieri, D. J.). The authority of the District Judge to exercise his discretion in awarding prejudgment interest was conceded in proceedings before District Judge.

The District Judge stated in a memorandum attached to the Final Decree herein that "the award (of prejudgment interest) in this case is justified in my opinion in view of the long delay in affording relief and which has been largely the result of the manner in which this litigation has been conducted" (Resp. Ap. A. 1).

There is no abuse of discretion here. No conflict exists. The law is clear and this question does not merit this Court's attention.

The District Court granted prejudgment interest on the damage awards as a matter of discretion because of the "long delay" and the manner in which the litigation has been conducted by the Petitioner, City of New York. Judge Palmieri in his memorandum attached to the Final Decree stated (Resp. Ap. A. 1):

> "The interlocutory decree was entered on September 6, 1961. The petitioner has strenuously litigated each and every facet of this case. The award of interest is concededly a matter of discretion. The award in this case is justified in my opinion in view of the long delay in affording relief which has been largely the result of the manner in which this litigation has been conducted."

The Court of Appeals allowed prejudgment interest for the claimants' damages suffered at the time of the loss and remanded the case to the District Court to review the judgment and to disallow any interest on any damages or com-

pensation for "future loss of earnngs or future pain and suffering" (Pet. Ap. A. 13). The opinion of the Court of Appeals states (Pet. Ap. A. 13):

> "• • • To the extent that there are elements of future losses which are represented in the final damages prejudgment interest is, of course, not appropriate. We therefore remand the case to the district court to determine consistent with this opinion what is the proper portion of the damages awarded for each claim on which the prejudgment interest should run."

Although the Court did not expressly say so, it is clear that it was doing no more than exercising the discretion, which all courts have in admiralty, to allow interest in whole or in part, or disallow it altogether, as seems fair under the circumstances of each case. This is settled law. In *The Scotland*, 118 U. S. 507, this Court said:

> "The allowance of interest on damages is not an absolute right. Whether it ought or not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or jury." (pp. 518-519)

To the same effect see Benedict on Admiralty, 6th Ed., Vol. 3, p. 191; Corpus Juris Secundum, Admiralty, Vol. 2, Sec. 205b, p. 358; Norris, The Law of Seamen, Sec. 695, p. 387.

The petitioner's contention that an Admiralty Court lacks power to award prejudgment interest in a personal injury claim was rejected by the Court of Appeals. The Appellate Court relied on its opinion in *McCormack Lines, Inc.* v. *Richardson*, 295 F. 2d 583, cert. denied, 368 U. S. 989 (1962), in which it stated at 295 F. 2d 592, 593:

> "If it was the intention of Congress to bar recovery of moratory interest on 'unliquidated' death claims,

> we are of course bound. But the hoary distinction between 'liquidated' and 'unliquidated' claims, criticized by eminent authority well before the enactment in 1920 of the Death on the High Seas Act, has never become so firmly entrenched in admiralty as it has been at law. The trend in admiralty prior to enactment of the statute had been toward allowance of prejudgment interest on claims for negligent or wrongful death. The Death on the High Seas Act merely instructs that 'the recovery * * * shall be a fair and just compensation for the pecuniary loss sustained.' 46 U.S.C.A. Sec. 762. We see nothing in this language to indicate that the Congress did not intend that the damages should give full compensation for all pecuniary loss sustained including that resulting from delay in being compensated. See 36 A.L.R. 2d 337, 345 (1954)."

Petitioner's contention that the decision of the Court below in the instant cases is directly in conflict with cases in the 6th and 9th Circuit refer to cases decided in 1919 and prior thereto which cases are in conflict with this Court's decision in *The Scotland*, 118 U. S. 507, *supra*.

The only comparatively recent case cited by petitioner, in support of its contention, is *Moore-McCormack* v. *Amirault*, 202 F. 2d 893 (C. A. 1) (1953). Petitioner concedes that the relevant part of the opinion of the Court of Appeals is *dictum*. The Court held that Federal Courts sitting in Admiralty has discretion to allow prejudgment interest on some unliquidated claims but went on to state that it was at least doubtful whether an Admiralty Court has discretion to allow such interest on personal injury claims. The Court stated: "We mention the problems discussed in the preceding four paragraphs merely to make clear that we reserve judgment upon them, *since the present case, as it comes to us does not require their determination*" (202 F. 2d 898, italics inserted). *Dictum* in an

opinion may not be submitted by petitioner in support of a contention that there is a conflict in the decisions of the Court of Appeals in different circuits. In *Stickel* v. *United States* (1956), 76 S. Ct. 1067, this Court said (1068): "What next follows in the opinion as to the so-called Second Circuit Doctrine is plainly dictum presenting nothing reviewable."

The Revised Rules of the Supreme Court permit interest if specifically directed by the Court, viz.:

> "Rule 56 (3) In cases in Admiralty, damages and interest may be allowed only if specifically directed by the Court."

This Rule makes no distinction as to damages to the hull of claimant's vessel, or as to damages for the death of the claimant's decedent on the high seas, or damage to a claimant such as respondent, Myron Varnum, who suffered a permanent severance of a section of his trigeminal nerve.

The decision of the Admiralty Court in the instant case not only specifically directed the allowance of interest, but the District Judge set forth his reason therefor; viz.: "The petitioner has strenuously litigated each and every facet of this case. The award of interest is concededly a matter of discretion. The award in this case is justified in my opinion in view of the long delay in affording relief and which has been largely the result of the manner in which this litigation has been conducted." (Memorandum attached to Final Decree. Resp. Ap. A. 1.)

This exercise of discretion was approved in the opinion of the Court of Appeals in the instant case, viz.: "The broad application of *restitutio in integrum* enables a more equitable measure of the loss to the injured party—particularly in light of the progressively long delays in disposing of much of the litigation which must wait its turn on crowded court calendars. Moreover, the award of pre-

judgment interest discourages sham contentions and an improper use of the law's delays and thereby assists an earlier settlement between the parties" (Pet. Ap. A. 12).

The question of the exercise of discretion by the Admiralty Court, in granting interest herein, is confined solely to this case. There is no question presented by the Petition for a Writ herein which is of general public interest. The decision below does not conflict with principles established by this Court. On the contrary, the allowance of damages with prejudgment interest has been established both by the Revised Rules of the Supreme Court (R. 56(3)) and by decisions of this Court.

The Court of Appeals' determination of the question of prejudgment interest was clearly correct. This point involves a question of District Judges' exercise of discretion and no question of law nor any question of general interest and does not merit the attention of this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

Solomon R. Agar, Esq.,
Counsel for Respondents.

Dated: Staten Island, New York, September 29th, 1964.

RESPONDENT'S APPENDIX I

Memorandum Endorsed and Attached to Final Decree.

September 20, 1963

As an additional allowance of costs in this case, and since they are innocent of any fault, the personal injury claimants are allowed as part of their costs here, the costs awarded against them in the companion limitations suit of Texaco, Inc.

John F. Woods, one of the personal injury claimants, is not included in this decree because settlement has been agreed upon. But since payment has not yet been made to him, this decree will be deemed without prejudice to his rights until such time as payment is effected.

The interest calculations set forth in the decree been made through September 17, 1963. Interest from that day forward can be calculated on the total of damages, interest and costs. The City of New York now claims for the first time that interest should be at the rate of 3% under Section 3-a of the New York General Municipal Law and that it should run from the date of the final decree, not from the date of damage. The interlocutory decree was entered on September 6, 1961. The petitioner has strenuously litigated each and every facet of this case. The award of interest is concededly a matter of discretion. The award in this case is justified in my opinion in view of the long delay in affording relief and which has been largely the result of the manner in which this litigation has been conducted.

The attached decree is deemed amended as hereinabove stated.

Sgd. EDMUND L. PALMIERI
Edmund L. Palmieri
U. S. D. J.